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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2001

ADALBERTO BONILLA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, consistently with this Court's opinion in *Stirone v. United States,* 361 U.S. 212 (1960), which held that constructive amendments of an indictment violate the grand jury clause of the Fifth Amendment to the United States Constitution and are *per se* reversible error, an appellate court may decline to notice a constructive amendment of the indictment under the plain error standard articulated by this Court in *United States v. Olano,* 507 U.S. 725 (1993).

2. Whether, if the *Olano* plain error standard is applicable, and the appellant is required to demonstrate prejudice, the appellate court's assessment of the *Olano* factors should focus upon the evidence at trial relating to the offense actually charged by the grand jury or, instead, upon the possibility that the defendant was convicted of an offense other than that with which he was charged by the grand jury.

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The opinion of the United States Court of Appeals for the First Circuit in this case, which may be found in the addendum to this petition, is unreported. *United States v. Bonilla,* No. 00-1592 (1st Cir. April 9, 2001).

STATEMENT OF JURISDICTION

The judgment of the First Circuit upholding Bonilla's convictions was entered on April 9, 2001. Bonilla's timely filed petition for rehearing and petition for rehearing *en banc* was denied on August 23, 2001. This Court has jurisdiction to review the judgment of the First Circuit on a writ of certiorari under 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[1]

Fifth Amendment, United States Constitution

18 U.S.C. §924(c). Penalties

18 U.S.C. §1951. Interference with commerce by threats or violence

STATEMENT OF THE CASE

A second superceding indictment returned against petitioner Adalberto Bonilla in May, 1999, charged him in Counts One and Two with conspiracy and substantive violations of the Hobbs Act, 18 U.S.C. §1951, and in Count Three with

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1 The text of the provisions listed is set forth in the Appendix to this Petition at A8-A13.

conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. §846. Count Four charged Bonilla with aiding and abetting the use and carrying of a firearm during and in relation to the crimes of violence charged in Counts One and Two and during and in relation to the drug trafficking crime charged in Count Three, in violation of 18 U.S.C. §924(c).[2]

The Hobbs Act charges grew out of the March 18, 1998, robbery of a private residence which an alleged coconspirator, Curtis Perkins, testified was targeted based upon information provided by Bonilla, then a Boston police officer, that the residents of the house used it as a place to store and sell drugs. Specifically, according to Perkins, Bonilla pointed out the house to him and another confederate, Will Howard[3], and told them that he had received information from a scurce that three Dominican men sold kilo quantities of cocaine from the house. Further according to Perkins, the plan included the use of firearms and a share for Bonilla of the proceeds from the sale of any cocaine stolen.

Because Perkins did not participate in the actual robbery, he was unable to describe what occurred inside the house. Those details were, therefore, provided by the house's resident, Joann Castillo, who testified that three men entered her house, pointing

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2 Bonilla was also charged, in Counts Five and Six, with obstruction of justice in violation of 18 U.S.C. §1512(b)(3). The jury returned verdicts of guilty on those counts, but Bonilla does not seek review of his convictions on Counts Five and Six in this petition for certiorari.

3 The government did not call Howard as a witness at trial because it had discovered that Howard lied regarding Bonilla's involvement in another home invasion. Charges relating to that home invasion were included in an earlier indictment but were deleted in the second superceding indictment after the falsity of Howard's accusation was discovered.

guns and identifying themselves as police officers. The men said to her, "Give me all your money. Give me all your stuff." When she told the men that she had no money, they told her to give them her jewelry. The men remained on the premises, going through her closets, for 15-20 minutes and then left. At no time did the men mention drugs, nor were any drugs found or stolen.

The government's theory of the requisite interstate commerce element was that the robbery was intended to interfere with drug dealing, which it contended was a form of unlawful interstate commerce. Absent an effect on interstate commerce, which would otherwise have been entirely absent, the home invasion charged in the Hobbs Act counts, Counts One and Two, would have been a purely state, rather than federal, offense. Thus, unless the jury found unanimously, beyond a reasonable doubt, that the object of the robbery was the theft of drugs or drug proceeds, it could not convict Bonilla on Counts One or Two. Similarly, unless the jury found that the object of the robbery was the theft of drugs, it could not convict him on Count Three, which charged him with conspiracy to possess cocaine with intent to distribute.

As charged in the indictment, Bonilla's guilt of the §924(c) offense charged in Count Four was expressly conditioned upon his guilt of at least one of the offenses charged in Counts One-Three. Count Four charged Bonilla with aiding and abetting the use and carrying of a firearm

> during and in relation to a crime of violence, *as charged in Counts One and Two of this Second Superceding Indictment,* and during and in relation to a drug trafficking crime, *as charged in Count Three of this Second Superceding Indictment* (emphasis added).

Thus, the indictment explicitly limited the possible predicates for the charged §924(c) violation to the specific offenses charged in

Counts One, Two, and Three -- the conspiracy and substantive Hobbs Act violations and the conspiracy to possess cocaine with intent to distribute. The trial court's instructions, however, did not correspondingly limit the jury's consideration of §924(c) predicates.[4] The court charged the jury that

> Count 4 charges the defendant with aiding and abetting -- in other words, assisting others who used firearms during and in relation to *a* crime of violence and *a* drug trafficking crime (emphasis added).

Later in the instructions, the judge elaborated:

> [I]n Count 4 the defendant is charged with aiding and abetting others who used and carried firearms during and in relation to *a* crime of violence and *a* drug-trafficking crime.
>
> In order to convict, the government must prove the following elements beyond a reasonable doubt: *First, that the defendant or one of his coconspirators committed a crime of violence or a drug-trafficking crime.* And I instruct you that the crime of interference with commerce by robbery, as charged in Count 2, is a crime of violence. And I instruct you that the crime of conspiracy to possess with intent to distribute cocaine, as charged in Count 3, is a drug-trafficking crime.
>
> ....I am not instructing you that these crimes were committed. I am just giving you the definition of what constitutes a crime of violence and a drug-trafficking crime.
>
> The second thing that the government must prove is that during and in relation to the commission of *a* crime of violence or *a* drug-trafficking crime the

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4 The indictment itself did not go to the jury, nor was it read to them.

> defendant aided and abetted one of his coconspirators, who knowing used or carried a firearm.
>
> * * * * * *
>
> The defendant may be found guilty of this firearm charge if it is proved beyond a reasonable doubt that he was an aider and abetter who knew to a practical certainty that a firearm would be used or carried *during that home invasion.* Second, the defendant may also be found guilty for the use [or] carriage of a firearm by a coconspirator in furtherance of the conspiracy if the use or carriage of the firearm was reasonably foreseeable.
>
> [I]f you find beyond a reasonable doubt *that the planned home invasion* would be carried out with the use of a firearm, or that the defendant actually knew that the plan called for home invaders to possess firearms *during the robbery,* then you may find him guilty of the crime charged in Count 4 (emphasis added).

Bonilla did not object to these instructions.

On the second day of their deliberations, the jury requested reinstruction on the elements of the offenses charged. The court repeated the above-quoted instructions essentially verbatim, except for the third paragraph quoted above. In its reinstruction, the court charged:

> I am not telling you that the crimes were committed. *I am just saying that, if committed, those would qualify as crimes of violence and a drug-trafficking crime* (emphasis added).

Bonilla also did not object to these instructions.

The jury also asked a question regarding the consequences of their agreeing on some counts but being unable to agree on others and asked the court to "elaborate on the tenet

of 'exercising caution' when considering the testimony of a witness who has been granted immunity or a plea bargain." That afternoon, the jury asked the following question: "Would it still be a violation of the Hobbs Act if drugs were not a factor or issue, only money and/or valuables obtained either legally or illegally?" The Court responded: "'If' drugs were not a factor or issue in the case, then there would be no potential effect on interstate commerce." About an hour later, the jury announced itself unable to agree on a verdict on Counts One, Two, and Three, but returned a guilty verdict on Count Four, as well as on Counts Five and Six.[5]

On appeal to the First Circuit, Bonilla contended that the trial court's instructions constructively amended Count Four by permitting the jury to convict Bonilla if he aided and abetted the use and carrying of a firearm during and in relation to *a* crime of violence -- even one which was not a federal offense -- or *a* drug trafficking crime, in violation of the grand jury clause of the Fifth Amendment to the United States Constitution. He further contended that this Court's decision in *Stirone v. United States,* 361 U.S. 212 (1960), with its emphasis upon the substantial constitutional right violated by a constructive amendment of the indictment, required reversal of his conviction on Count Four even under the plain error standard. The First Circuit rejected the substantial and important issues raised by Bonilla in three sentences of an unpublished *per curiam* opinion:

> We have read the record and conclude that, even if the challenged instructions were less than ideal, this is not a case that warrants an exercise of our discretion to notice any errors under Rule 52(b). With respect to the

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5 Bonilla was sentenced to 30 months on Counts Five and Six, to be served concurrently with each other, and to 60 months on Count Four, to be served consecutively to the sentences imposed on Counts Five and Six. Bonilla is currently incarcerated.

> instructions on Count IV, it suffices to observe that it was all but undisputed that the home invaded by Bonilla's confederates was targeted because it was thought to contain drugs and drug money, and that the evidence was more than sufficient to support the conclusion that Bonilla aided and abetted the use and carrying of the firearms employed in this home invasion. Thus, notwithstanding the absence of unanimous verdicts on Counts I-III and the jury's question about drugs, we do not regard the conviction on Count IV as a "miscarriage of justice' within the meaning of *Olano*....

App.A4-A5.

REASONS WHY THE WRIT SHOULD BE GRANTED

The trial court's instructions, in permitting the jury to find Bonilla guilty of the §924(c) offense charged in Count Four if it found that he aided and abetted the use and carrying of a firearm during and in relation to *a* crime of violence or *a* drug trafficking crime, rather than limiting the jury's consideration of potential predicates to the offenses charged in Counts One, Two, and Three, broadened the offense charged in Count Four substantially beyond that actually charged by the grand jury and, therefore, constituted a constructive amendment of the indictment in violation of the grand jury clause of the Fifth Amendment. The constructive amendment was particularly pernicious in this case, as the jury was unable to agree on a verdict on Counts One through Three, the specified Count Four predicates. The home invasion/robbery charged in Counts One and Two as a violation of the Hobbs Act was a federal offense *only* if there were a potential impact upon interstate commerce. At least some of the jurors apparently found that element lacking, but the jury likely had no doubt that a crime of violence -- in effect, a state law robbery or home invasion -- had occurred.

Because §924(c) limits crime of violence predicates to those "for which the person may be prosecuted in a court of the United States," the constructive amendment likely resulted in Bonilla's conviction and 60-month consecutive sentence not simply for an offense not charged by the grand jury, but, most critically, *for conduct which was not even a federal crime.*

Constructive amendments directly contravene the grand jury guarantee of the Fifth Amendment and are such anathema to our constitutional system of criminal justice that this Court, in *Stirone v. United States,* 361 U.S. 212 (1960), placed them squarely within that tiny category of errors so destructive of fundamental fairness as to constitute *per se* reversible error. Despite the unequivocal holding of *Stirone,* however, the First Circuit found the constructive amendment which occurred in this case barely worthy of its attention at all and entirely unworthy of notice under the plain error standard articulated by this Court in *United States v. Olano,* 507 U.S. 725 (1993). Indeed, the Court's opinion did not so much as mention *Stirone,* let alone explain why an error can be so profoundly antithetical to our ordered notions of fairness and justice as to mandate automatic reversal without further inquiry if there was an objection at trial but become so minor as to be barely worthy of discussion if there was not.

The question of the mode of appellate review applicable to cases in which the trial court's jury instructions constructively amended the indictment, but the defendant did not object to those instructions, is one which has divided the circuits. The Fourth Circuit, for example, has held that constructive amendments are error *per se* which must be corrected on appeal even in the absence of an objection. The Fifth Circuit, in marked contrast, has held that an appellate court may, under the *Olano* standard, decline to grant relief from a constructive amendment of the indictment and has largely proceeded to do so. Other circuits fall somewhere in between. Some, like the First Circuit

in this case, have, in applying the *Olano* standard, focused their assessment upon the weight of the evidence as to the offense actually charged by the grand jury, while others, like the District of Columbia Circuit, have found dispositive the possibility that the defendant was convicted of an offense with which he had not been charged by the grand jury.

The questions presented in this petition regarding the interrelationship between the *per se* reversal rule of *Stirone* and the *Olano* plain error standard are of substantial importance to the administration of criminal justice. They are, moreover, ones as to which this Court's review is essential in light of the wide divergence of standards in the various circuits, a divergence so profound that Bonilla's Count Four conviction would have been reversed as error *per se* had this case been tried in the Fourth Circuit but in the First Circuit was allowed to stand based on an analysis which treated the constructive amendment as nothing more than a garden variety instructional error. They are also, finally, questions whose import extends well beyond the specific constructive amendment context to the more general question of how structural errors to which no objection was made at trial are to be reviewed on appeal.

I. THIS COURT'S *STIRONE* DECISION.

Modern-day constructive amendment jurisprudence had its genesis in this Court's opinion in *Stirone v. United States,* 361 U.S. 212 (1960). In *Stirone,* the indictment specified that the interstate commerce affected by the defendant's extortionate activities was the shipment of sand into Pennsylvania. The district court's instructions to the jury, however, permitted the jury to find the interstate commerce element of the charged Hobbs Act violation based upon *either* the shipments of sand into Pennsylvania *or* potential future shipments of steel from Pennsylvania to other states. *Id.* at 213-14. This Court concluded that it was error to permit the jury to convict the

defendant based upon the uncharged steel shipments "and that the error [could not] be dismissed as merely an insignificant variance between allegation and proof and thus harmless error ...." *Id.* at 215.

The Court began its analysis with the proposition, derived from *Ex parte Bain,* 121 U.S. 1 (1887), that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone,* 361 U.S. at 215-16. That being the case, "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Id.* at 217. These fundamental precepts were, the Court concluded, violated by the district court's instructions:

> The indictment here cannot fairly be read as charging interference with movements of steel to other states....The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importations of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel....And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. *Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same.*

Id. at 217 (emphasis added). Moreover, and most critically for this case, the Court found constructive amendment of the indictment too fundamental a defect to be treated as harmless error:

> While there was a variance in the sense of a variation

between pleading and proof, *that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error....* The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

Id. at 218 (emphasis added). The Court continued:

[T]here are two essential elements of a Hobbs Act crime: interference with commerce and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. *It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened. The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment.* Here, as in the Bain case, we cannot know whether the grand jury would have included within its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with.

> Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted the petitioner. *If so, he was convicted on a charge the grand jury never made against him. This was fatal error.*

Id. at 218-19.

Thus, *Stirone* established that, when the trial court's instructions broaden the permissible bases for conviction beyond those charged by the grand jury[6], an impermissible constructive amendment of the indictment occurs which, at least where the defendant objected at trial, requires reversal of the defendant's conviction. This Court has not retreated from *Stirone* in the more than forty years which have passed since that decision. *See United States v. Miller*, 471 U.S. 130, 138-40 (1985).

II. THE CONSTRUCTIVE AMENDMENT IN THIS CASE.

The essential elements of an offense under 18 U.S.C. §924(c) are "(1) that the defendant committed the predicate drug trafficking crime or crime of violence; (2) that the defendant

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6 The First Circuit, as well as most other circuits, has expressly recognized that an indictment may be constructively amended in violation of the Fifth Amendment grand jury clause "by jury instructions which have the effect of broadening the charges in the indictment." *United States v. Portela*, 167 F.3d 687, 701-02 (1st Cir.), *cert. denied*, 528 U.S. 917 (1999). *See, e.g., United States v. Dunn*, 758 F.2d 30, 35 (1st Cir. 1985). *See also United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999), *cert. denied*, 531 U.S. 906 (2000); *United States v. Reyes*, 102 F.3d 1361, 1365 (5th Cir. 1996); *United States v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994); *United States v. Lawton*, 995 F.2d 290, 294 (D.C. Cir. 1993); *United States v. Mollica*, 849 F.2d 723, 729-30 (2d Cir. 1988).

knowingly carried or used a firearm; and (3) that the defendant did so during and in relation to the specified offense." *United States v. Currier*, 151 F.3d 39, 41 (1st Cir.), *cert. denied*, 525 U.S. 1056 (1998). Section 924(c) further requires that the underlying predicate offense be one "for which the person may be prosecuted in a court of the United States," *i.e.*, the §924(c) predicate offense must be a *federal* crime. Whether or not the government is, or should be, required to particularize the §924(c) predicate offense or offenses in the indictment rather than relying upon the generic statutory terminology, when the §924(c) count *does* specify the predicate(s) during and in relation to which the firearm was used or carried, the specified predicates become essential elements of the §924(c) charge which must be proven beyond a reasonable doubt. *See, e.g., United States v. Randall*, 171 F.3d 195, 209-10 (4th Cir. 1999), *cert. denied*, 531 U.S. 906 (2000); *United States v. Ramos-Rodriguez*, 136 F.3d 465, 468 (5th Cir.), *cert. denied*, 525 U.S. 967 (1998); *United States v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994). *Cf. United States v. Leichtnam*, 948 F.2d 370, 379 (7th Cir. 1991).

Therefore, Bonilla's commission of at least one of the offenses charged in Counts One, Two, or Three was, because of the manner in which the government chose to structure the indictment, an essential element of Count Four which the government was required to prove beyond a reasonable doubt. Most critically, under the grand jury clause of the Fifth Amendment, the offenses charged in Counts One, Two, and Three were the *only* §924(c) predicate offenses upon which the jury could permissibly base a verdict of guilt. Simply put, unless Bonilla was guilty beyond a reasonable doubt of at least one of those offenses, he was not guilty of the §924(c) offense charged in Count Four.

Instead of limiting the jury's consideration to the offenses charged in Counts One through Three as required by the charging language of Count Four, however, the trial court's

instructions permitted the jury to convict Bonilla on Count Four if it found that he aided and abetted the use and carrying of a firearm during and in relation to *a* crime of violence or *a* drug trafficking crime, thus broadening the potential bases for conviction beyond those charged by the grand jury.

While the instructions referenced the offenses charged in Counts Two and Three[7], they did so only in terms of telling the jury that the offenses charged in those counts were by definition, respectively, a crime of violence and a drug trafficking crime and, therefore, *qualified* to be considered as §924(c) predicate offenses. Nothing in the instructions told the jury that their consideration of §924(c) predicates was *limited* to those offenses. Quite the contrary, the instructions referred repeatedly in generic terms to "a" crime of violence and "a" drug trafficking crime and, to the extent they provided any additional focus, referred only to "the robbery" or "the home invasion". These latter references did not, however, supply the requisite limitation of the jury's consideration to the offense actually charged by the grand jury.

Armed robberies and home invasions are undoubtedly crimes of violence, but they are not necessarily crimes "for which [Bonilla] may be prosecuted in a court of the United States," as required under §924(c), as they are not necessarily violations of the Hobbs Act, because a robbery only violates the Hobbs Act if the requisite effect on interstate commerce is present. Thus, while the instructions read as a whole may have narrowed "a" crime of violence to the home invasion/robbery which gave rise to the charges in Counts One and Two, they did not confine the jury's consideration to the offenses charged in Counts One and Two. Rather, they permitted the jury to convict

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7 The trial court's instructions did not mention Count One, the Hobbs Act conspiracy, as a potential §924(c) predicate offense.

Bonilla if it found beyond a reasonable doubt that Bonilla aided and abetted the use and carrying of a firearm during and in relation to the home invasion/robbery at 18 Monson Street, *regardless of whether that home invasion/robbery constituted the federal Hobbs Act violation charged in Count Two.*[8]

Thus, the trial court's instructions constructively amended Count Four of the indictment.

III. THE NATURE OF THE CONSTRUCTIVE AMENDMENT ERROR.

In the wake of *Stirone,* it has become firmly established that constructive amendments are "prejudicial *per se* and

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8 A number of cases have recognized, in the §924(c) context specifically, that jury instructions which permit the jury to convict of a §924(c) violation based upon a predicate or predicates other than those charged in the §924(c) count constructively amend the indictment in violation of the grand jury clause of the Fifth Amendment. *See, e.g., United States v. Ramirez,* 182 F.3d 544, 546 (7th Cir. 1999)(indictment charged use and carrying in relation to the distribution of marijuana; instructions permitted conviction if defendant used and carried firearm in relation to any drug offense); *Randall,* 171 F.3d at 203-04, 209-10 (§924(c) count charged use and carrying during and in relation to the distribution of narcotics; instructions permitted conviction based on possession with intent to distribute predicate); *United States v. Reyes,* 102 F.3d 1361, 1364-65 (5th Cir. 1996)(indictment charged use and carrying in relation to distribution of marijuana; instructions told jury that §924(c) predicate was conspiracy to possess marijuana); *Willoughby,* 27 F.3d at 266 (charged predicate was distribution of cocaine; instructions permitted conviction based on possession with intent to distribute or drug trafficking in general). *See also Leichtnam,* 948 F.2d at 379 (indictment charged use and carrying of a specifically identified firearm; instructions permitted conviction based upon any one of three firearms introduced into evidence).

grounds for reversal of a conviction." *Portela*, 167 F.3d at 701. "Under *Stirone*...the mere possibility that the conviction rests upon an offense not charged by the grand jury is sufficient to call for reversal of the conviction." *Dunn*, 758 F.2d at 36. This is the rule not just in the First Circuit, but in every circuit. *See United States v. Floresca*, 38 F.3d 706, 711 & n.12 (4th Cir. 1994)(*en banc*)(collecting cases). Therefore, had Bonilla's counsel raised an objection at trial, the constructive amendment of Count Four which resulted from the trial court's instructions would have entitled Bonilla to automatic reversal on appeal of his conviction on that count without further inquiry. However, he did not.

The question then becomes one of the interrelationship between the automatic reversal rule of *Stirone* and the plain error standard of review under Fed.R.Crim.P. 52(b) outlined by this Court in *United States v. Olano*, 507 U.S. 725 (1993).[9] Were the error here simply instructional error as to an element of the offense, the *Olano* standard and its requirement of a showing of prejudice would apply, as instructional errors are generally subject to review for harmless error. *See, e.g., Neder v. United States*, 527 U.S. 1 (1999).[10] Constructive amendments, however, are not. They should not, therefore, be subject to the same plain

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9 Plain error under Fed.R.Crim.P. 52(b) requires that the defendant demonstrate (1) error, (2) which is "plain", and (3) which affected his substantial rights. *See, e.g., Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *Olano*, 507 U.S. at 732. Where that plain error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," *Johnson*, 520 U.S. at 467; *Olano*, 507 U.S. at 736, the defendant's conviction should be reversed, notwithstanding the lack of objection at trial.

10 Constitutionally defective reasonable doubt instructions are an exception to this general rule and are *per se* reversible error. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993).

error standard as that applied to errors subject to harmless error analysis.

The universe of constitutional errors has come to be divided into two mutually exclusive categories. The first, commonly designated as "trial errors", includes constitutional errors "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)(Rehnquist, C.J., concurring). The second, commonly designated as "structural errors", includes a "limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.'" *Neder*, 527 U.S. at 7, *quoting Fulminante*, 499 U.S. at 309. Structural errors are those which

> "affect[] the framework within which the trial proceeds ...." *Fulminante*, [499 U.S.] at 310....Such errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630...(1993), and "necessarily render a trial fundamentally unfair," *Rose* [*v. Clark*], 478 U.S. [570,] 577 [(1986)]....Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence...and no criminal punishment may be regarded as fundamentally fair." *Id.* at 577-78[.]

Neder, 527 U.S. at 8-9. Placing the error in one or the other of these categories determines the standard of review on appeal -- trial errors are subject to harmless error analysis, but structural errors are not. Although this Court has never formally labeled constructive amendments as structural error, it *has* clearly stated in *Stirone* that constructive amendments are *not* subject to harmless error analysis. They must, therefore, be regarded as

structural defects in the trial process.

How, then, are structural errors, and specifically, constructive amendments, to be treated under the *Olano* standard? On this question, the approaches followed by the various circuits are in conflict.

IV. THE APPROACHES TAKEN BY VARIOUS CIRCUITS TO THE CONSTRUCTIVE AMENDMENT/PLAIN ERROR ISSUE.

A. The Fourth Circuit: *Floresca.*

The *en banc* Fourth Circuit held in *Floresca* that "under *Stirone,* constructive amendments of a federal indictment are error *per se,* and, under *Olano,* must be corrected on appeal even when not preserved by objection." *Floresca,* 38 F.3d at 714. In *Floresca,* the Court applied the *Olano* standard in a case in which the indictment charged a violation of 18 U.S.C. §1512(b)(1), but the trial court instructed the jury on the elements of 18 U.S.C. §1512(b)(3). It did so, although it found it "by no means clear that we should," 38 F.3d at 712, because "[w]e believe that, because constructive amendments are not subject to review for harmlessness, the Supreme Court would consider them to be 'structural defects' in the trial mechanism." *Id.* If that were the case, then the Court's finding of a constructive amendment would end the matter without further inquiry. The Court, however, found sufficient ambiguity in *Olano* regarding its applicability to structural defects, that it decided to proceed with an *Olano* analysis even though it had "difficulty imagining a structural defect that does *not* 'seriously affect the fairness, integrity, or public reputation of judicial

proceedings.'" *Id.* (emphasis in original).[11]

The Court had no doubt that the first two *Olano* factors were satisfied -- that the constructive amendment was error and that the error was plain. *Id.* As to the third factor, whether the error affected the defendant's substantial rights, the *Floresca* Court reasoned:

> There *should* be no question that the error affected Floresca's substantial right to grand jury indictment - after all, the Supreme Court has already said that it does: a constructive amendment "destroy[s] the defendant's *substantial right* to be tried only on charges presented in an indictment returned by a grand jury." *Stirone,* 361 U.S. at 217[.] "The right to have the grand jury make the charge on its own judgment is a *substantial right* which cannot be taken away with or without court amendment." *Id.* at 218-19[.]

Id. at 712-13 (emphasis added by Court). The Court found further support for its conclusion that constructive amendments *always* violate substantial rights in the language of Rule 52 itself, concluding that, because Rule 52(a) defines harmless error as error which does *not* affect substantial rights and because *Stirone* held that constructive amendments can *never* be harmless, "constructive amendments *must* affect substantial rights." *Id.* at

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11 The Court noted that the First Circuit, in an opinion written by then-Chief Judge Breyer, *United States v. Colon-Pagan,* 1 F.3d 80, 81 (1st Cir. 1993), had concluded that a constitutionally defective reasonable doubt instruction, albeit a structural defect under *Sullivan, see* note 10, *supra,* was nonetheless subject to the *Olano* test. *Floresca,* 38 F.3d at 712 n.14. The Court also noted that the District of Columbia Circuit had applied the *Olano* test to a constructive amendment in *United States v. Lawton,* 995 F.2d 290 (D.C. Cir. 1993). *Id.*

713 (emphasis in original).

The Court also found this approach necessary to reconcile *Olano* and *Stirone*:

> Though *Olano* obviously stands for the rule that a defendant must ordinarily demonstrate that he has been prejudiced by the error in order to prevail, it is equally evident that the *Olano* Court contemplated that there would be exceptions to that rule. "There may be a special category of forfeited errors that can be corrected *regardless* of their effect on the outcome...." *Olano*, [507 U.S. at 735],... (emphasis supplied). Thus, while interpreting *Stirone* to mean what it says - that an inquiry into prejudice is not appropriate where a constructive amendment has occurred - is entirely consistent with *Olano*, interpreting *Olano* to require a showing of prejudice in *every* case essentially overrules *Stirone*. The Supreme Court has not overruled *Stirone*, and we may not.

Id. at 713.[12]

With respect to the final step of the *Olano* analysis -- whether the constructive amendment seriously affected the fairness, integrity or public reputation of judicial proceedings -- the *Floresca* Court prefaced its discussion with the recognition that

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12 Then Chief-Judge Breyer reached a similar conclusion in *Colon-Pagan*, *see* note 11, *supra*, in which he, writing for the Court, concluded that the structural error of a constitutionally defective reasonable doubt instruction fell into the "special category of forfeited errors" described in *Olano* and that, therefore, the Court "need not consider the strength of the evidence...in order to hold that the instruction 'affected substantial rights.'" *Id.* at 82.

> we must once again leave unfulfilled the desire, born of reflex and not of contemplation, to inject a prejudice component into our analysis. Such a consideration may be appropriate and weigh in a defendant's favor in a case where he is required to demonstrate actual prejudice in order to satisfy the third prong - and succeeds in doing so. However, in a case like Floresca's, where the error amounts to a structural defect that renders irrelevant, *ab initio,* the question of prejudice, *logic requires us to instead focus on the nature of the error itself.*

Id. at 713 (emphasis added). The "nature of the error" was Floresca's conviction for a crime for which he was not indicted by the grand jury, and the court "[did] not hesitate to say that convicting a defendant of an unindicted crime affects the fairness, integrity, and public reputation of federal judicial proceedings in a manner most serious." *Id.* at 714.[13]

B. The Fifth Circuit: *Reyes* and *Fletcher.*

In direct contrast, the Fifth Circuit concluded in *Reyes* that it had the discretion under *Olano* to decline to notice a constructive amendment of the indictment. *Reyes,* 102 F.3d at 1365-66. In *Reyes,* the §924(c) count charged possession of marijuana with the intent to distribute as the predicate offense, but the instructions told the jury that it was required to find that the defendant used and carried a firearm in relation to a

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13 In *Randall,* the Fourth Circuit applied the *Floresca per se* rule in a case in which the §924(c) count charged the defendant with using and carrying a firearm in relation to the distribution of narcotics, but the evidence and instructions permitted conviction based upon use and carrying in relation to possession with intent to distribute. *Randall,* 171 F.3d at 203-10. The Court noted the inconsistent rule followed by the Fifth Circuit, *see id.* at 207-08 n.5, discussed in the next section of this petition.

conspiracy to possess marijuana with intent to distribute. The Court had no difficulty deciding that a constructive amendment had in fact occurred. However, the Court refused to correct the error, citing a number of reasons for its decision, including the fact that the instructed predicate was a statutorily permissible §924(c) predicate and its conclusion that the evidence was overwhelming as to both the charged predicate and the instructed predicate, as well as its assessment of the potential for sandbagging inherent in the defendant's failure to object to the constructive amendment at trial. *Id.* at 1366.

Reyes mentioned neither *Floresca* nor *United States v. Lawton,* 995 F.2d 290 (D.C. Cir. 1993), discussed in the next section of this petition, in which the District of Columbia Circuit reversed a conviction based upon a constructive amendment of the indictment under the plain error standard. Another panel of the Fifth Circuit later noted these decisions, but elected to consider itself bound by *Reyes. United States v. Fletcher,* 121 F.3d 187, 193 & n.4 (5th Cir. 1997), *cert. denied,* 522 U.S. 1063 (1998). In that case, the Court concluded that the defendant's substantial rights were not violated because, as the charged predicate was a lesser included offense of the instructed predicate, the jury necessarily found all the elements of the charged predicate. *Id.* at 193 & n.6.

C. The District of Columbia Circuit: *Lawton.*

In *Lawton,* the District of Columbia Circuit considered a case in which the defendant was charged with various embezzlement offenses relating to his taking of money from his local union, of which he was the president. The statute under which he was charged only criminalized the embezzlement of funds from a union of which the defendant was an officer or employee. The trial court's instructions, however, permitted the jury to convict if it found that the defendant had embezzled funds from his local *or* the district council *or* the international

union. *Lawton,* 995 F.2d at 292-93. The Court applied the *Olano* standard and reversed the convictions, concluding that the "rigorous" *Olano* standard had been met because

> [t]here is the distinct possibility that the jury convicted Lawton on the basis that he embezzled money belonging to the International. If this occurred, Lawton stands convicted under [29 U.S.C.] §501(c) for conduct the provision does not make a federal criminal offense. By anyone's lights, that is prejudicial.

Id. at 294. The District of Columbia Circuit's approach appears to have more in common with that of the Fourth Circuit rather than that of the Fifth. While not adopting a *per se* plain error rule, the Court clearly focused upon the "nature of the error" -- the possibility that the defendant was convicted of an offense with which he was not (and could not have been) charged by the grand jury -- rather than employing the more sufficiency of the evidence oriented Fifth Circuit approach.

D. The Ninth Circuit: *Shipsey* and *DiPentino.*

In *United States v. Shipsey,* 190 F.3d 1081 (9th Cir. 1999), the indictment charged the defendant with theft by false pretenses from an employee benefit plan, along with various counts of mail fraud and wire fraud. The instructions permitted the jury to convict the defendant simply if he wrongfully took money from the benefit plan, without requiring a finding of fraud. Prior to *Olano,* the rule in the Ninth Circuit was that constructive amendments were plain error requiring reversal. *Id.* at 1087. The Court noted the conflicting post-*Olano* opinions in *Floresca* and *Reyes,* but found it unnecessary to decide whether reversal *per se* continued to be required after *Olano,* because Shipsey was clearly prejudiced by the constructive amendment. The jury's inability to reach a verdict on the mail and wire fraud counts, the Court concluded, demonstrated that Shipsey was

prejudiced by the district court's instruction that allowed the jury to convict him of theft without finding fraud. *Id.*

In *United States v. DiPentino*, 242 F.3d 1090 (9th Cir. 2001), the Court again found it unnecessary to decide whether constructive amendments always require reversal under a plain error standard, because the defendants were prejudiced by the district court's instructions which permitted the jury to convict the defendants of violating the Clean Air Act not just based on the work practice standard which the indictment charged them with violating but also based upon an uncharged work practice standard violation. *Id.* at 1095-96. While the *Shipsey* prejudice analysis partook somewhat of a sufficiency of the evidence inquiry, the controlling factor for the *DiPentino* Court seems to have been the likelihood that the defendants were convicted of an offense other than that charged by the grand jury.

E. The Seventh Circuit.

In *United States v. Cusimano*, 148 F.3d 824, 829 n.3 (7th Cir. 1998), the Court noted the *Floresca* holding, but did not reach the issue of whether constructive amendments always constitute plain error because it found that no amendment had occurred. In an earlier case, the Court assumed *arguendo* that the instructions had constructively amended two counts of the indictment, but concluded that the *Olano* plain error standard was not satisfied because the defendants had not shown that the jury would have reached a different result absent the amendment. In another case which, although decided post-*Olano* did not discuss *Olano*, the Court reversed the defendant's convictions, finding *per se* plain error in a constructive amendment resulting from the trial court's instructions because it was impossible to tell whether the jury had convicted the defendant under §924(c) based upon the firearms charged in the indictment or, instead, based upon uncharged firearms which the instructions included as a permissible basis for conviction. *United States v. Pedigo*,

12 F.3d 618, 629-31 (7th Cir. 1993).

Most recently, however, the Court has indicated that, to constitute plain error under *Olano*, "[a] constructive amendment will rise to the level of plain error justifying reversal when it amounts to 'a mistake so serious that but for it the [defendant] probably would have been acquitted.'" *United States v. Ramirez*, 182 F.3d 544, 547 (7th Cir. 1999), *quoting United States v. Gunning*, 984 F.2d 1476, 1482 (7th Cir. 1993). The Court reversed Ramirez' conviction because there was no evidence that he used or carried a firearm in relation to the charged §924(c) predicate, although there was evidence connecting him to the use and carrying of firearms in relation to uncharged predicates which the trial court's instructions permitted the jury to consider. Therefore, the Court concluded, the defendant would have been acquitted but for the constructive amendment. He was, accordingly, entitled to reversal of his conviction under the plain error standard. *Id.* at 547-48.

F. The First Circuit.

The First Circuit has never before considered the question whether constructive amendments constitute plain error *per se* and can hardly be said to have done so in this case. If any rule can be divined from its cursory treatment of the issues in this case, it appears to be one based entirely upon sufficiency of the evidence considerations -- because, in its view, the evidence sufficed to convict Bonilla on Count Four based upon the charged predicates (even though the jury was unable to reach a verdict as to any of them), it apparently does not matter, for plain error purposes, that it is highly likely that the jury convicted Bonilla based upon uncharged offenses and, in so doing, very likely convicted him of something not even punishable as a federal offense.

G. Conclusion.

Clearly, had this case arisen in the Fourth Circuit, Bonilla's Count Four conviction would have been reversed. Had this case been tried in either the District of Columbia or the Ninth Circuits, the result likely would have been the same, given the close parallels between the facts of this case and those of *Lawton* and *Shipsey*. In the Seventh Circuit, the outcome would have been more uncertain, but, as Bonilla likely would have been acquitted on Count Four but for the constructive amendment, as evidenced by the jury's inability to reach a verdict on any of the charged predicates, his conviction may have been reversed in that circuit as well. What would have occurred in the Fifth Circuit is anyone's guess. In the First Circuit, the violation of Bonilla's substantial right to be convicted only upon charges made by the grand jury was shunted aside in three sentences.

The differing approaches taken by the various circuits to this important question make review by this Court essential. Does *Stirone* mean what it says or does it not? Does a constructive amendment of the indictment violate the defendant's substantial rights or does it not? Can a conviction be upheld, even under the plain error standard, when there exists a demonstrable likelihood that the defendant was convicted of an offense with which he was not charged by the grand jury?

V. THE APPROPRIATE STANDARD.

A. Generally.

Bonilla suggests that the most appropriate reconciliation of *Stirone* and *Olano* is found in the holding of *Floresca* that "under *Stirone*, constructive amendments of a federal indictment are error *per se*, and, under *Olano*, must be corrected on appeal even when not preserved by objection." 38 F.3d at 714. As the *Floresca* Court explained:

By including the Grand Jury Clause in the Bill of Rights, the Framers - mindful of the intimidating force and presence of a strong national government and the potential for abuse of that force - recognized the need to interpose a group of common local citizens between the accused and the sovereign. The purpose of the grand jury, if nothing else, is to check individual abuses of the official power to initiate a prosecution. Our founding fathers realized that the grand jury is vital in preventing prosecutions grounded solely in spite, revenge, or difference in philosophy. We believe that the wisdom of the Framers in this regard has stood the test of time; thus, depriving an accused of the protection of the grand jury would be, no less today than yesterday, intolerably unfair.

"Integrity" has been defined as, among other things, "firm adherence to a code."...For over two hundred years, persons accused of a federal crime have had an absolute constitutional right to a grand jury indictment. *Stirone* itself was, of course, an affirmation of that right in the strongest possible terms. In the law, one of our most time-honored codes is that of *stare decisis,* present in this case both by virtue of the unequivocal language of the Constitution and by *Stirone's* condemnation, now over thirty years past, of *ever* sustaining a conviction for an unindicted crime. No court could choose to consciously ignore all that has gone before while simultaneously maintaining the integrity of the law.

As to the effect that convicting a person of an unindicted offense might have on the public reputation of federal judicial proceedings, we do not doubt that there are a significant number of citizens who - though ignorant of their own state constitution's criminal procedure requirements, or perhaps even unaware that their state has a constitution - are keenly cognizant of the

> need for a grand jury indictment in a federal prosecution. We are certain that such citizens, not to mention those better versed in the law, would be outraged if the federal courts suddenly decided, by fiat, to start conducting trials without first having a grand jury consider the government's evidence. To embark on such a course would gravely threaten the very legitimacy of the federal tribunals.

Id. at 714 (emphasis in original).

Even if, however, the Court were to conclude that a rule of *per se* plain error for constructive amendments was unwarranted or unwise, an important question still remains as to the appropriate focus of the fourth *Olano* inquiry -- whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. Should that inquiry focus upon the sufficiency of the evidence as to the charged offense, even though the trial court's instructions did not limit the jury to that offense, or should it focus rather on the likelihood that the jury convicted the defendant of an offense not charged by the grand jury? The appropriate inquiry, as the Fourth Circuit expressly recognized in *Floresca* and as other courts have implicitly recognized, must be tied to the nature of the constructive amendment error. By definition, a constructive amendment broadens the potential bases for conviction beyond the charges made by the grand jury. The very definition of constructive amendment thus incorporates a high degree of potential prejudice to which the finding that a constructive amendment has in fact occurred in a particular case necessarily gives reality. That there may have been sufficient evidence to warrant a conviction of the offense charged in no way eliminates or ameliorates the prejudice inherent in a constructive amendment.

Accordingly, if a defendant is required to demonstrate

prejudice to satisfy the *Olano* standard, the focus of that inquiry must be upon whether the court's instructions permitted the jury to convict the defendant of an offense not charged by the grand jury and the likelihood that the jury did so. If there exists a demonstrable possibility that the defendant was convicted of an offense other than that charged by the grand jury, then the error should be corrected under the plain error standard. Such an error, as the Fourth Circuit concluded in *Floresca,* "affects the fairness, integrity and public reputation of judicial proceedings in a manner most serious." 38 F.3d at 714.

B. As Applied To This Case.

Under a *per se* plain error standard or under a possibility of conviction of an offense not charged by the grand jury plain error inquiry, Bonilla's conviction on Count Four should be reversed. Few things could be more fundamentally unfair than a process which permits the criminal conviction of an individual for an offense with which he was not charged and, as here, sends him to prison for conduct which the jury likely did not even find was a federal crime.

The jury in this case was unable to reach a verdict on Counts One, Two, or Three -- the only three §924(c) predicates charged. Therefore, had the instructions properly limited the jury's consideration to the specifically charged predicates, the outcome of this case would almost certainly have been different -- the jury would not have returned a guilty verdict on Count Four. This conclusion comes into even clearer focus when the questions asked by the jury during its deliberations are examined. *See* pages 5-6, *supra.* It seems reasonably clear that the point of dissension among the jurors was whether or not drugs were the object of the home invasion. This lack of agreement would have precluded conviction on Count Four on the theory of using and carrying a firearm during and in relation to a drug trafficking crime. What it would not have precluded,

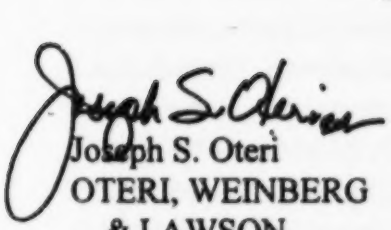
however, given the trial court's instructions, was conviction on Count Four on the theory of using and carrying a firearm during and relation to a garden-variety home invasion/robbery, *i.e.*, one in which interstate commerce was *not* affected and which was not, therefore, a federal offense and, accordingly, not a legally permissible §924(c) predicate.

The judge's instructions permitted conviction on Count Four on the basis of a home invasion/robbery not encompassed within the Hobbs Act, and, considering the circumstances, this was most likely what the jury did. Thus, the constructive amendment here was particularly pernicious -- not only did it permit the jury to convict Bonilla of an offense which was not charged by the grand jury, *it permitted the jury to convict Bonilla of something that was not even a federal crime.*

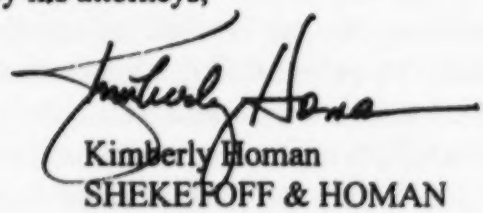
CONCLUSION

For all the foregoing reasons, Bonilla's petition for a Writ of Certiorari should be granted.

Respectfully submitted,
By his attorneys,



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